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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. .....

MISSISSIPPI RIVER SAND & GRAVEL COMPANY,
a Corporation,
Petitioner,

vs.

FLOYD C. WILKES, Administrator of the Estate of
Paul D. Godsey, Jr., Deceased, and
TANNER DAVIS, Administrator of the Estate of
Edward A. Resch, Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mississippi River Sand & Gravel Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit, rendered on March 3, 1953, which, by a divided court, reversed a judgment of the United States District Court for the Western Division of the Western District of Tennessee sustaining the motion of petitioner to dismiss respondents' libel for want of jurisdiction.

JURISDICTION.

Jurisdiction to review the case upon writ of certiorari is conferred upon this Court by 28 U. S. C. A., Section 1254 (1).

The opinion of the Court of Appeals was filed March 3, 1953. An order, upon stipulation of the parties, was made by the District Court staying further proceedings pending the filing and disposition of this petition for certiorari.

OPINIONS BELOW.

The opinion of the District Court appears at pages 126-131 of the record. The majority opinion of the Court of Appeals and the dissenting opinion of Judge Miller appear in 202 F. 2d 383 (Advance Sheets), and are also printed in the record (R....). Certified copy of the record and the required number of additional copies are filed with the petition.

QUESTIONS PRESENTED.

The questions presented by this petition are:

(1) Whether, under the undisputed facts, the sole jurisdiction to determine what damages or compensation, if any, the libelants are entitled to receive is vested in the Deputy Commissioner, acting under the Longshoremen's and Harbor Workers' Act (U. S. C. A., Title 33, Sec. 901, et seq.).

(2) Whether the award of the Deputy Commissioner in the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, filed by Mrs. Vivian Fay Godsey, widow of Paul Godsey, Jr., deceased, is res judicata as to libelant (respondent) Floyd C. Wilkes, Administrator of the estate of Paul D. Godsey, Jr., deceased.

STATUTES INVOLVED.

Pertinent provisions of the statutes involved (Title 46, U. S. C. A., Sec. 688, et seq., and Title 33, U. S. C. A., Sec. 901 et seq.), are set forth in the appendix.

STATEMENT.

The facts are undisputed (R. 135, 136; page 2 of the Opinion of the Court of Appeals).

Petitioner, Mississippi River Sand & Gravel Company, in its operation used a dredge, a barge and a towboat. Neither the dredge nor the barge was self-propelled.

There was machinery on the dredge which pumped sand from the bed of the river and deposited this on the barge by means of a conveyor. Decedents had nothing to do with the operation of the dredge machinery (R. 106, 107).

Specifically their duties consisted exclusively of trimming, spreading or leveling with a shovel or by other means the sand or gravel on the barge as it was deposited thereon by the conveyor belt. Their duties were identical, one of them working on a night shift and the other on the day shift. Their work on the barge consumed their entire time and was to accomplish two purposes, to-wit: (1) To distribute the gravel evenly over the entire barge so that it would not form a pyramid or become cone-shaped as it came off of the conveyor belt and thereby cause the barge to list; and, (2) To assure an accurate measurement of the gravel for which petitioner, under its contract with the Government, was compensated by the cubic yard (R. 98, 99, 100, 102).

The towboat, which transported the loaded barge to the river bank and brought the empty barge to the dredge, was operated exclusively by an engineer employed for

that purpose and decedents had nothing to do with this operation (R. 107-109).

The loaded barge was moved to some point on the river bank and anchored there. The Government would send one of its tugs to get the loaded barge, empty the gravel from it and sometimes it would bring this empty barge to the location of petitioner's dredge (R. 110, 112), but petitioners had nothing whatever to do with the transportation of the barge to or from the river bank either by a government tug or petitioner's towboat, all duties with respect to navigation being performed exclusively by others (R. 101, 103, 107, 134).

Decedents slept and ate their meals on the barge. This was not compulsory but no deductions were made for their room or meals if they ate or slept elsewhere (R. 106).

OPINIONS AND FINDINGS.

The issue presented was thus accurately stated by Judge Martin in the majority opinion of the Court of Appeals:

> "Upon analysis, the issue presented for decision is whether these cases are governed by the Longshoremen's and Harbor Workers' Act, Title 33, U. S. C. A., section 901 et seq., or by the Jones Act, Title 46, U. S. C. A., section 688, et seq."

Prior to bringing these suits in admiralty, which were tried together, Mrs. Vivian Fay Godsey, widow of Paul D. Godsey, Jr., deceased, filed her claim for compensation under the Longshoremen's and Harbor Workers' Act. Subsequently, and while the suit by the administrator of the estate of Godsey, Jr., was pending in admiralty, she moved to dismiss her claim under the Longshoremen's Act. This motion was disallowed by the Deputy Commissioner, who found that Paul Godsey, Jr., at the time of his injury and death, "was not a member of a crew of any vessel and the work he performed was of the sort (usually) performed

by laborers and directly related to cargo on a vessel for transportation by water" (R. 21-23).

The District Court found that the actual duties of Godsey and Resch were similar and that neither had any duty to perform on the dredge or barge which primarily or naturally aided in navigation, and neither was anything more than a laborer employed to remove gravel from the bed of the Mississippi River and transfer it to the barges operated by petitioner (R. 135).

With respect to the claim of Godsey the District Court held that the award of the Deputy Commissioner, acting within his proper jurisdiction under the Longshoremen's & Harbor Workers' Compensation Act, was res adjudicata as to libelant, Floyd C. Wilkes, Administrator of the estate of Paul D. Godsey, Jr., deceased (R. 135).

After stating that it must constantly be borne in mind that these suits were brought under the Jones Act, which should be construed liberally, Judge Martin further said:

> "After quoting in his succinct, clear-cut opinion from the writings in **Carumbo v. Cape Cod S. S. Co.**, supra; **Warner Co. v. Norton**, supra; and **South Chicago v. Bassett**, supra, the District Judge said: 'Now, from these cases and others, the important descriptive word as used is the word "primarily." In other words, if the duties of the deceased persons in this case were "primarily" and naturally concerned with the loading of the barges, they to the Court's mind are laborers, and are to be regarded as being in the sort of work as is engaged in by longshoremen or harbor workers.' He added: 'Under the proof they performed no substantial duties as are usually performed by seamen or "members of the crew." It cannot be said that they had any duties on the vessel which "primarily" and naturally aided in navigation. If so, it was only in a very indirect way.'

"From our own analysis of the uncontroverted facts, we think that this was not the test to be applied in determining the status of the decedents in an action brought under the Jones Act.

* * * * * * * *

"In our judgment, an employer who hires men to work on the water on vessels engaged in navigation and permits them to have such a permanent connection with the vessel as to expose them to the same hazards of marine service as those shared by all aboard should not be permitted, by merely restricting their duties or by adopting particular nomenclature as descriptive of their tasks, to limit his liability to such employees, in the event of disability or death alleged to have been caused by the negligence of the employer, to the extent prescribed by the Longshoremen's Act."

(Opinion, pp. 6, 7.)

The dissenting opinion of Judge Miller, expressed in a single paragraph, is as follows:

"I am of the opinion that the judgment should be affirmed on the authority of **South Chicago Coal and Dock Company v. Bassett**, 309 U. S. 251; **Swanson v. Marra Brothers, Inc.**, 328 U. S. 1, 6-7; See also: **Radcliff Gravel Co. v. Henderson**, 138 Fed. (2) 549, C. A. 5th, cert. denied 321 U. S. 782; **De Wald v. Baltimore & Ohio R. Co.**, 71 Fed. (2d) 810, C. A. 4th, cert. denied 293 U. S. 581; **Puget Sound Freight Lines v. Marshall**, 125 Fed. (2d) 876, C. A. 9th; **Wm. Spencer & Son Corp. v. Lowe**, 152 Fed. (2d) 847, C. A. 2nd, cert. denied 328 U. S. 837; **Rowen v. Brown**, 61 Fed. Supp. 858, 861, W. D. Mich.; **Rackus v. Moore-McCormack Lines, Inc.**, 85 Fed. Supp. 185, E. D. Pa.; **Gulf Oil Corp. v. McManigal**, 49 Fed. Supp. 75 N. D., W. Va."

(Opinion, pp. 7, 8.)

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The Decision of the Court Below Is in Conflict With Applicable Decisions of This Court.

In making the hazard of risk (p. 7 of the Opinion), instead of duties on the vessel which "naturally and primarily" aid in navigation, the test of determining whether a case is governed by the Longshoremen's and Harbor Workers' Act (Title 33, U. S. C. A., Sec. 901 et seq.) or by the Jones Act (Title 46, U. S. C. A., Sec. 688 et seq.), the Court of Appeals decided an important question in conflict with the decision of this Court in **South Chicago Coal and Dock Company v. Bassett**, 309 U. S. 251.

In the Bassett case this Court, after discussing the meaning of the word "crew" as distinguished from a longshoreman or a laborer at work upon the vessel, said:

> "In The Bound Brook (D. C.), 146 F. 160, 164, it was said that 'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board.' Judge Hough in The Buena Ventura (D. C.), 243 F. 797, 799, thought that statement was a fair summary, and in his view one who served the ship 'in her navigation' was a member of the 'crew'. Id., p. 800, see, also, Seneca Washed Gravel Co. v. McManigal (C. C. A. 2d), 65 F. (2d) 779."
>
> (84 L. Ed. 737.)

See also **Swanson v. Marra Brothers, Inc.**, 328 U. S. 1, 6-7, and **Pa. R. R. Co. v. O'Rourke**, 97 L. Ed. (Advance Sheets) 262.

In **Desper v. Starved Rock Ferry Co.**, 342 U. S. 187, this Court held that the question as to whether an individual is a "seaman" within the Jones Act depends largely on facts of the particular case and the activity in which such individual was engaged at time of injury.

This holding cannot be reconciled with the holding of the Court of Appeals in the instant case that the risk incurred is a material consideration in determining whether the case is governed by the Jones Act or the Longshoremen's Act.

The Bassett case makes the "primary" duties of the employee the controlling consideration in determining whether he falls within the coverage of the Jones Act or the Longshoremen's and Harbor Workers' Act and, as it will be hereinafter shown, it has been so construed in numerous Courts of Appeals and District Courts.

II.

Conflict in Decisions of Courts of Appeals That Should Be Settled by This Court.

The decision in the instant case is in direct conflict with the decisions of the Court of Appeals for the Second Circuit in **Merritt-Chapman & Scott Corp. v. Willard**, 189 F. 2d 791, and **Wm. Spencer & Son Corp. v. Lowe**, 152 F. 2d 847, 848; the decision of the Court of Appeals for the Fourth Circuit in **DeWald v. Baltimore & Ohio R. Co.**, 71 F. 2d 810; the decision of the Court of Appeals for the Fifth Circuit in **Radcliff Gravel Co. v. Henderson**, 138 F. 2d 549; the decision of the Court of Appeals for the Ninth Circuit in **Puget Sound Freight Lines v. Marshall**, 125 F. 2d 876.

The DeWald case (71 F. 2d 810) was cited with approval by this Court in the Bassett case. The factual situation in the DeWald case was very similar to such

situation in the instant case. His duties, as found by the Deputy Commissioner, were the "checking and supervising of the loading and unloading of cargo from barges and keeping all records with regard to the cargo," and he performed no duties in connection with navigation "except the incidental one of making lines fast and unfast at docks or alongside vessels" (71 F. 2d 811, 812).

In **Radcliff Gravel Co. v. Henderson**, the facts were almost identical with those involved in the instant case. The employer was engaged in dredging gravel and sand from the bed of Three Rivers Lake, a part of the navigable waters of the United States. The employees trimmed the sand and gravel as it was loaded onto barges to keep it from forming a pyramid or being cone-shaped. Their contract of employment provided that the employer was to furnish transportation to and from the shore and dredge boat. The boat was overloaded and two of the employees were drowned when it capsized approximately four miles from the landing. It was held that these facts clearly brought the case within the coverage of the Longshoremen's and Harbor Workers' Compensation Act. The Bassett case was among the authorities cited in support of the conclusion reached.

In **Merritt-Chapman & Scott Corp. v. Willard**, the Court of Appeals for the Second Circuit held that the "primary duties" of the employee "had to do with cargo and was such as are ordinarily performed by harbor workers" and upon the authority of the Bassett case held that the employee was within the coverage of the Longshoremen's and Harbor Workers' Act rather than the Jones Act, stating that the Bassett case **"apparently makes primary duties the test"** (189 F. 2d 792).

In **Wm. Spencer & Son Corp. v. Lowe** the Court of Appeals for the Second Circuit, distinguishing between the facts involved in the Bassett case and in Norton v. Warner Co., 321 U. S. 567, said:

"The contention is that Norton v. Warner Co., 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931, requires the opposite conclusion. We think not. There the bargee was employed by the month and provided with quarters on board; 'he had no duties in connection with the handling of cargo and no shore duties' (321 U. S., at page 568, 64 S. Ct., at page 749, 88 L. Ed. 931); his duties in connection with navigation were more than pumping out and handling lines; they included responding to whistles from the tugs and putting out navigational lights and signals (321 U. S., at page 567, 64 S. Ct., at page 749, 88 L. Ed. 931). In the case at bar the claimant's primary duties had to do with the cargo and were such as longshoremen customarily perform. That he had the additional tasks of pumping the hold, handling the lines when docking or casting off, and making minor repairs, such as painting the cabin, is not enough to take him out of the class of harbor workers for whom the Act was intended to provide compensation. We agree with the deputy commissioner and the district judge that the controlling authority is the Bassett case, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732."

(152 F. 2d 848.)

In **Puget Sound Freight Lines v. Marshall,** 125 F. 2d 876, the Court of Appeals for the Ninth Circuit thus described the duties of a stevedore in that case:

"The stevedore, as was the claimant (F. Jondro) in this case, loads and unloads the hand trucks and stows cargo while the deck-hand pushes the trucks during loading and discharging operations. The stevedore's duties in addition require him to put the cargo plank out upon arrival at a dock and to take it in upon departure. His sole duties are in relation to the loading and discharging of cargo although on

occasion a stevedore may handle a line as an incident to his main work, but is not required to do so. He has no duties while the vessel is underway. He is in reality a traveling longshoreman and does anything he desires to pass the time while en route from port to port. He may take the wheel occasionally, but is not required to do so."

(125 F. 2d 878.)

Recognizing that the distinction between a longshoreman and a crew-member hinges upon whether or not the employee is "naturally and primarily on board (the vessel) to aid in her navigation," the Court held the employee was not a member of the crew but within the coverage of the Longshoremen's & Harbor Workers' Compensation Act, so holding although the employee, as an "incident" to his main work, on occasions, put down the cargo plank on arrival and removed it upon departure and he was "provided with meals and sleeping quarters on board (the vessel) as part of his contract of employment" (125 F. 2d 878).

III.

In Holding That the Godsey Claim Is Not Res Adjudicata by Reason of the Proceedings Under the Longshoremen's Act Before the Deputy Commissioner, the Court of Appeals Rendered a Decision in Conflict With the Applicable Decision of This Court in South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, and With Decisions on the Same Point by the Court of Appeals for the Second Circuit in Hagens v. United Fruit Co., 135 F. 2d 842, 843, and With the Decision of the Court of Appeals for the Fifth Circuit in Southern Stevedoring Co., Inc., v. Henderson, 175 F. 2d 863, 865.

The Longshoremen's & Harbor Workers' Compensation Act was passed subsequent to the Jones Act and in a pro-

ceeding instituted under the Longshoremen's Act jurisdiction is presumed in the absence of evidence to the contrary (**Taylor et al. v. McManigal et al.** [6th Cir.], 89 F. 2d 583) and, unless overthrown by affirmative, undisputed evidence to the contrary, the finding of the deputy commissioner is conclusive. This rule applies even though the evidence before the deputy commissioner permits conflicting inferences (**South Chicago Coal & Dock Co. v. Bassett**, supra, pages 260, 261 of the Opinion; **Southern Stevedoring Co., Inc., v. Henderson** [5th Cir.], 175 F. 2d 863, 865).

In the application of this rule, "reasonable inferences from the evidence by the commissioner are not judicially reviewable. This is true even though the evidence warrants conflicting inferences" (Southern Stevedoring Co., Inc., v. Henderson, supra, page 865 of the Opinion, and numerous cases cited in footnote 6 on that page).

The conclusions reached in the cases cited are compelled by the express provisions of the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. A., Sec. 905).

ADDITIONAL POINTS.

Instead of filing a separate brief in support of its petition, petitioner here presents additional matters which, as conceived by it, show that the majority opinion of the Court of Appeals was not only erroneous as a construction of the statutes involved but was in conflict with applicable decisions of this Court and the decisions of the Courts of Appeal in other circuits.

(1) The Jones Act was passed prior to the adoption of the Longshoremen's & Harbor Workers' Compensation Act. The latter was a humanitarian statute and should be construed liberally to effectuate its purposes (**Pillsbury et al. v. United Engineering Co. et al.**, 342 U. S. 197, 72

S. Ct. 223; **Spencer Kellogg & Sons, Inc., v. Willard** [3rd Cir.], 190 F. 2d 830, 831).

(2) The provision in the Longshoremen's & Harbor Workers' Compensation Act, relating to the "crew" is an exception or proviso in that Act, and the rule that an exception from a general policy which a law embodies should be strictly construed is quite elementary. **Spokane & Inland Empire Railroad Co. v. United States,** 241 U. S. 344, 349; **Piedmont & N. Ry. Co. v. United States** (4th Cir.), 30 F. 2d 421, 431.

At any rate, the definition of "crew," as used in the Longshoremen's & Harbor Workers' Compensation Act, should not be made to depend upon the question of whether the injured employee institutes suit under the Jones' Act or the Harbor Workers' Compensation Act but the two statutes should be integrated (**Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,** 342 U. S. 282, 286), and the word "crew" given the meaning ascribed to it by this Court in the Bassett case.

(3) Petitioner, both prior and subsequent to the deaths of Paul E. Godsey, Jr., and Edward A. Resch, did in all things comply with the requirements of the Longshoremen's & Harbor Workers' Compensation Act and all rules and regulations promulgated thereunder (R. 9). Consequently, the deputy commissioner had exclusive jurisdiction to determine the liability of petitioner. **U. S. C. A.,** Title 33, Sec. 905; **South Chicago Coal & Dock Co. v. Bassett,** supra; **Lo Bue v. United States** (2nd Cir.), 178 F. 2d 528; **De Martino v. Bethlehem Steel Co.** (1st Cir.), 164 F. 2d 177; **Warner Co. v. Norton** (3rd Cir.), 137 F. 2d 57.

(4) Judge Martin, in his opinion, emphasized the point that decedents slept on the barge. This, while a matter proper to be considered, did not materially affect their

status or change the actual duties they were engaged to perform. **Puget Sound Freight Lines v. Marshall** (9th Cir.), 125 F. 2d 876; **Rowen v. Brown,** 61 F. Supp. 858, 861; **Gulf Oil Corp. v. McManigal,** 49 F. Supp. 75, 79.

(5) In determining the status of decedents, it is important to note that neither was a licensed seaman or required to perform any navigational duties but their employment was restricted to work that could have been done by any stevedore. **Seneca Washed Gravel Corp. et al. v. McManigal et al.** (3rd Cir.), 65 F. 2d 779, 780; **Merritt-Chapman & Scott Corp. v. Willard** (2nd Cir.), 189 F. 2d 791, 792.

(6) The gist of an action under the Jones' Act is negligence (U. S. C. A., Title 46, Sec. 688) and, in order to recover, the plaintiff must allege and prove negligence (**Jamison v. Encarnacion,** 281 U. S. 635; **Pittsburgh S. S. Co. v. Palo** [6th Cir.], 64 F. 2d 698). In an action, however, under the Longshoremen's & Harbor Workers' Compensation Act, compensation is payable irrespective of fault as to the cause of the injury (**Southern Stevedoring Co., Inc. v. Henderson** [5th Cir.], 175 F. 2d 663).

(7) This case involves the jurisdiction of the District Court to hear and determine the question involved. The District Court held that it did not have such jurisdiction. One member of the Court of Appeals concurred in that view. This situation, as viewed by us, presents an exceptional case which justifies this Court in granting the writ of certiorari to review the decision of the Court of Appeals in advance of a retrial of the case. If it should be finally determined that the District Court was without jurisdiction, a trial would be an idle ceremony.

It is therefore respectfully suggested that this Court should take jurisdiction without awaiting the results of a second trial or a second appeal, and particularly so since there is an insuperable objection in point of jurisdiction

to the trial of the case in the District Court (**Denver v. New York Trust Co.**, 229 U. S. 123; **Rochester Telephone Corp. v. United States**, 307 U. S. 125).

This Court has jurisdiction to grant the writ under Title 28, Section 1254.1 of the United States Code, and Title 28, Section 2101 of that Code, and it is conceivable that granting the writ might be as beneficial to respondents, or more so, than it would be to petitioner.

PRAYER.

Wherefore, Petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for review and determination a full and complete transcript of the record below and that the decision of said Court of Appeals be reversed, the decision of the United States District Court for the Western Division of the Western District of Tennessee be affirmed and that petitioner have such other, further and general relief as to this Court may seem right and proper.

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JAMES M. REEVES,
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Of Counsel.

APPENDIX.

Statutes Involved.

The pertinent provisions of the statutes involved are as follows:

The Jones Act, which was passed in 1920, provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply * * *." 46 U. S. C. A. # 688.

The Longshoremen's and Harbor Workers' Compensation Act, which was passed in 1927, provides:

> "Sec. (#) 903.
>
> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee * * *. No compensation shall be payable in respect of the disability or death of—(1) a master or a member of a crew of any vessel. * * *" 33 U. S. C. A. # 903.
>
> "Sec. (#) 905.
>
> "The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment

of compensation as required by this chapter, an
jured employee or his legal representative in c
death results from the injury, may elect to claim c
pensation under this chapter, or to maintain an act
at law or in admiralty for damages on account
such injury or death. In such action the defend
may not plead as a defense that the injury was cau
by the negligence of a fellow servant, nor that
employee assumed the risk of his employment,
that the injury was due to the contributory ne
gence of the employee." 33 U. S. C. A. # 905.

Office Supreme Court, U.S.
FILED
JUN 24 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. [redacted]101

MISSISSIPPI RIVER SAND & GRAVEL COMPANY,
a Corporation,
Petitioner,

vs.

FLOYD C. WILKES, Administrator of the Estate of Paul D. Godsey, Jr., Deceased, and

TANNER DAVIS, Administrator of the Estate of Edward A. Resch, Deceased,
Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 841.

MISSISSIPPI RIVER SAND & GRAVEL COMPANY,
a Corporation,
Petitioner,

vs.

FLOYD C. WILKES, Administrator of the Estate of Paul D. Godsey, Jr., Deceased, and

TANNER DAVIS, Administrator of the Estate of Edward A. Resch, Deceased,
Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

The final judgment of the trial court dismissing Respondents' action was reversed and the cause remanded

for trial and there has been no judgment on the merits and the writ should be denied. Only in extraordinary instances is the writ issued before final decree, and often not then. If the judgment of the Court of Appeals is final, the action is not an extraordinary one. A supersedeas bond should be exacted if the writ issues.

Heike v. *U. S.*, 217 U. S. 423, 30 S. Ct. 539.

Hamilton-Brown Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 36 S. Ct. 269.

II.

The dissenting opinion in this case points to no specific assignment of conflict for the dissent and the main opinion does not conflict with any of the authorities cited. In the Henderson case the barges were not owned or towed by the employer and the bargees drowned by the capsize of a motorboat ate and slept at home. The conflict, if any, must be certain and not debatable.

III.

The points contained in the petition for certiorari all ultimately converge into the general proposition that the opinion in this cause conflicts with the opinion in the Bassett case. This assertion is fully and completely answered and denied by the Court of Appeals and in support thereof we might add that the fallacy of the contention is exposed upon a mere comparison of the factual phases of the two cases. The methods of transportation and the services of the employees and the conditions and circumstances were not the same. They are wholly dissimilar in principle and fact.

IV.

The vessel in the Bassett case was self-propelled, designed to carry coal on her deck from the dock to outly-

ing vessels and was in active navigation only when in motion, that is, when "plowing the sea." The employee who fell overboard and was drowned ate and slept at home and called when needed and was not therefore more or less permanently connected with the vessel and he was not primarily on board to perform and did not perform any duties while the vessel was in active navigation, and at the time of the accident the vessel was at rest. None of the requirements existed necessary to make him a member of the crew.

V.

The dredgeboat was not self-propelled, nor designed to carry sand and gravel on her deck, but, instead, by means of machinery and mechanical contrivances, while afloat, transported sand and gravel from the river to the barges, which made her a vessel in active navigation while thus engaged.

> "In *McMaster* v. *One Dredge*, (D. C.) 95 Fed. 832, Judge Bellinger cited a number of cases and concluded that a barge, capable of being moved from place to place in navigable waters for the transportation of machinery or sand and gravel taken from the bottom of rivers, was a vessel and might be subject to maritime laws. He said: 'It is wholly immaterial that the sand and gravel so transported is brought from the bottom of the river. It may as well be taken from the adjacent uplands. It can make no difference, as to the occupation of the dredge in the transportation of this material, where it was obtained. The fact that gives to the dredge the character of a vessel is its use in the transportation of the material which it was designed to carry.'" *City of Los Angeles* v. *United Dredging Co.*, 14 F. 2d 364.

The two employees in question ate and slept on the dredgeboat and were therefore more or less permanently connected therewith and the dredgeboat was in active navigation as they performed their duties on the barges tied to the dredgeboat for which they were primarily on board. The vessels employed were one concern under one management with one objective. These two employees' services contributed to the work of the dredgeboat, barges and towboat in transporting the sand and gravel, a continuous and unbroken performance from the bed of the river to the point of final destination, thereby aiding in active navigation, and the other requirements necessary to make them members of the crew were present as correctly held by the Court.

VI.

The barges, while secured to the dredgeboat, by timely and momentarily release action and river current, were navigated alongside the dredgeboat as they received the sand and gravel to complete the journey of transportation by use of the towboat.

> "That a dredge and her scows are to be treated as one concern and subject to admiralty jurisdiction has been several times decided, and I think rightly." *The Starbuck*, 61 Fed. 502.
>
> Also see: *Maryland Casualty Company* v. *Lawson*, 94 F. 2d 190, 193, cited in 321 U. S. 565.

The above-doctrine has been reiterated and re-affirmed time and again and never questioned and the principle is generally applied when applicable to other enterprises on land or water.

The beneficiaries of the other employees who lost their lives in the same explosion recovered judgments under the Jones Act and the Petitioner has satisfied them.

Wherefore, Respondents pray the Court to deny said petition for Writ of Certiorari.

Respectfully submitted,

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